Federal Court  Cour fédérale

Date: 20150409

Docket: T-353-14

Citation: 2015 FC 429

Ottawa, Ontario, April 9, 2015

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

THOMAS GORDON MACINTYRE AND SCOTT LINDSAY MACINTYRE

Applicants

And

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT

Respondent

JUDGMENT AND REASONS

[1] This is an application by Thomas Gordon MacIntyre and Scott Lindsay MacIntyre [the Applicants] seeking to revoke Order-in-Council 68/1574 dated July 27, 1922. That Order-in-Council authorized the enfranchisement of the Applicants' paternal grandmother, Elsie Russ,

ostensibly in accordance with section 122 of the *Indian Act*, RSC 1906, c 81. The requested relief is sought to facilitate the Applicants' registration as Indians.

[2] The justification advanced in support of this application is that Ms. Russ' application for enfranchisement was made in error and in accordance with a process that was "procedurally flawed". The Applicants argue that the Court can review the historical record and, if satisfied the Governor-in-Council lacked statutory authority to enfranchise Ms. Russ or acted unreasonably in the exercise of its lawful authority, the Order-in-Council can be declared invalid or revoked. In that event, the Applicants say they would be entitled to recognition of Indian status.

[3] Much has been said over the years about the historical injustices that have befallen the descendants of Indians who were deprived of Indian status by enfranchisement. The concept of enfranchisement was rooted in the misguided and prejudicial idea that Indians should abandon their culture and fully integrate into "white society". Not surprisingly very few Indians were sympathetic to the idea and only a handful sought to be voluntarily enfranchised. The process was, of course, coercive in the sense that to acquire the advantages of Canadian citizenship, one was required to abandon the advantages of Indian status. The situation was even worse for women who married non-Indian men. Those women lost their Indian status by operation of law and not by application. The oppressiveness of the government's enfranchisement policy and the unevenness of later attempts to ameliorate the hardships it created were thoughtfully described by Justice David Stratas in *Canada (Attorney General) v Larkman*, 2012 FCA 204, [2012] FCJ No 880 at paras 10-14:

> [10] "Enfranchisement" is a euphemism for one of the most oppressive policies adopted by the Canadian government in its

history of dealings with Aboriginal peoples: *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Backward*, vol. 1 (Ottawa: Canada Communication Group Publishing, 1996) at page 271.

[11] Beginning in 1857 and evolving into different forms until 1985, "enfranchisement" was aimed at assimilating Aboriginal peoples and eradicating their culture or, in the words of the 1857 Act, encouraging "the progress of [c]ivilization" among Aboriginal peoples: *An Act to Encourage the Gradual Civilization of Indian Tribes in the Province and the Amend the Laws Respecting Indians*, S. Prov. C. 1857, 20 Vict., c. 26 (initial law); *An Act to Amend the Indian Act*, S.C. 1985, c. 27 (the abolition).

[12] Under one form of "enfranchisement" – the form at issue in this case – Aboriginal peoples received Canadian citizenship and the right to hold land in fee simple. In return, they had to renounce – on behalf of themselves and all their descendants, living and future – their legal recognition as an "Indian," their tax exemption, their membership in their Aboriginal community, their right to reside in that community, and their right to vote for their leaders in that community.

[13] The Supreme Court has noted the disadvantage, stereotyping, prejudice and discrimination associated with "enfranchisement": *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. With deep reluctance or at high personal cost, and sometimes under compulsion, many spent decades cut off from communities to which they had a deep cultural and spiritual bond.

[14] On April 17, 1985, the day on which the equality provisions of the *Canadian Charter of Rights and Freedoms* came into force, amendments to the *Indian Act* also came into force, doing away with the last vestiges of "enfranchisement" and permitting those who lost Indian registration through "enfranchisement" to register and regain registration: *An Act to Amend the Indian Act, supra*. However, under these amendments, only some of the descendants of those who were "enfranchised" could be added to the Indian Register. In other words, only some were able to regain their recognition as an "Indian" and their membership in their Aboriginal community.

[4] The Court is, thus, left in the unenviable position of reviewing the reasonableness of a decision that was, on its face, lawfully made almost 100 years ago in accordance with a statutory regime that is now considered prejudicial and paternalistic. I am also faced with a problem that Parliament has chosen to only partially remedy. The task is rendered more difficult as the persons who could best explain what went on in 1922 (ie. Ms. Russ and her immediate family) are deceased and where the relevant documentary record is sparse and possibly incomplete.

[5] There is an additional element of absurdity to the situation confronting the Applicants. If Ms. Russ had lost her Indian status by virtue of her subsequent marriage to a non-Indian, the Applicants would apparently now qualify for recognition. However, inasmuch as Ms. Russ relinquished her Indian status as a means of acquiring Canadian citizenship before she married, they do not qualify. It is difficult in the circumstances to identify any redemptive feature to the regime that was applied to Ms. Russ or to distinguish its hardships from the rule that stripped Indian status from women who married non-Indian men. In this case, I would add that the Applicants' father is registered under *Indian Act* because of the restoration of his mother's (Ms. Russ') registration. Nevertheless, the Applicants are denied that status.

[6] The Applicants' first argument is that the Governor-in-Council lacked the statutory authority to issue the impugned Order-in-Council in 1922 and, in the result, the Court can grant the necessary declaratory relief on that basis. This same argument was put to Justice Catherine Kane on a motion by the Applicants for an extension of time to commence this proceeding. Justice Kane was not convinced that this argument had merit and she rejected it as a basis for granting an extension. Her decision on this issue bears repeating:

[61] The respondent provided a chronology of Section 122A to establish that it was in force in 1922. Notably, in 1924, section 7 of *An Act to Amend the Indian Act*, SC 1924 (14-15 Geo V), c 47, came into effect, stating that:

(8) Section one hundred and twenty-two A as enacted by section six, chapter twenty-six of the statutes of 1918, was not intended to and shall be deemed not to have been repealed by section three of chapter fifty of the statutes of 1920, and any act or thing done under the provisions of said section one hundred and twenty-two A shall be and is hereby declared to be valid and effective.	(8) Il n'était pas question d'abroger l'article cent vingt-deux A, tel qu'édicté par l'article six du chapitre vingt-six du Statut de 1918, et il n'est pas censé l'avoir été par l'article trois du chapitre cinquante du Statut de 1920, et tous actes ou choses accomplis sous le régime des dispositions dudit article cent vingt-deux A sont, par la présente loi, valables et effectifs, et sont déclarés l'être.

…

[66] I find that there is little or no merit to the argument that the Order was made in 1922 without statutory authority due to the alleged gap in the law regarding section 122A. Although that section was not re-enacted until 1924, the wording of the amending statute is clear and is corrective.

[67] According to Sullivan, *supra* at 682 to 684:

> A common form of retroactive legislation is the so-called declaratory provision. It cures doubts or mistaken interpretations of existing law by declaring its true meaning not only for the future but also for the past. As Lambert J.A. explained in *Hornby Island Trust Committee v Stormwell* [(1988), 53 DLR (4th) 435 (BCCA)]:
>
> > … where a statute is declaratory of the law, it may be both natural and fair to interpret it, under a retroactive construction, as a statement not only of what the law is at the time of the enactment but also as a statement of what the law has always been.
>
> Pigeon J. points out that not every provision designed to clarify a legal rule or correct a faulty

> interpretation is necessarily retroactive. The hallmark of the retroactive provision is its declaration that the law not only is but always has been, or is deemed always to have been, as described or set out in the provision. There must be something in the wording of the provision, or in the circumstances in which it is enacted, to indicate that the provision is meant to apply to past as well as future acts [*Healey v Quebec (AG)*, [1987] 1 SCR 158 at 165-66].
>
> [68] The language of the 1924 amending statute that reinstated section 122A is unequivocal; it declared that the section "was not intended to and shall be deemed not to have been repealed" and that "any act or thing under [section 122A] shall be and is hereby declared to be valid and effective." Given this language, it appears to be clear that the 1920 amendment, which repealed several sections of the *Indian Act*, had mistakenly repealed section 122A.

[7] Like Justice Kane, I am satisfied that Parliament's 1924 Indian Act amendment was intended to remedy the mistaken repeal of section 122A and, in so doing, to retroactively validate all intervening acts. The retroactive intent of the 1924 amendment is clear on its face and leaves no room for a contrary interpretation.

[8] Justice Kane justified the granting of an extension on the basis that Ms. Russ' enfranchisement application may not have been completely voluntary. She stated, "[w]hile it may be a significant challenge to establish that [Ms. Russ] did not voluntarily enfranchise, there is an argument to be made". I am, accordingly, left to examine the historical record to determine if it can support a finding that would legally undermine the impugned Order-in-Council.

[9] The situation facing the Applicants is not dissimilar to the one that was considered in the earlier case of *Larkman v Canada*, 2013 FC 787 aff'd 2014 FCA 299, 436 FTR 181 (Eng.) aff'd

248 ACWS (3d) 493. In that case, Ms. Larkman was seeking to overcome the same statutory remedial limitation that applies to the Applicants; as second-generation descendants with two successive generations of mixed parenting, they are not entitled to reclaim status. As in *Larkman*, the only apparent means by which relief can be sought in such a situation is to attack the Order-in-Council by which Ms. Russ' enfranchisement was effected.

[10] I am satisfied that the standard of review that applies to challenges to Governor-in-Council decision involving matters of mixed fact and law is reasonableness: see *League for Human Rights of B'Nai Brith Canada v Canada*, 2010 FCA 307, [2012] 2 FCR 312 at paras 83-91.

[11] The historical record assembled by the Applicants indicates that Ms. Russ formally applied for enfranchisement on January 20, 1922. Her signed application declared that she was a member of the "Haidah" Band and not then living on the reserve. The local Indian Agent, Thomas Deasy, certified he knew Ms. Russ and believed her to be "a fit and proper person to become enfranchised". Accompanying Ms. Russ' application was a Release and Surrender sworn by Ms. Russ before a Commissioner of Oaths declaring she was of the full age of 21 years and unmarried. The effect of that document was to surrender "all claims whatsoever to any interest in the lands or property" of the "Haidah" Band.

[12] Also included with Ms. Russ' application was a certificate sworn by her brother-in-law before a Commissioner of Oaths attesting to, among other things, her "good moral character" and

her fitness for citizenship. Mr. Deasy submitted Ms. Russ' application to the Department of Indian Affairs on January 26, 1922.

[13] On April 15, 1922, the Department of Indian Affairs returned to Mr. Deasy "the papers in connection with the application for enfranchisement of [Miss Russ]" for correction and to address the issue of her employment. According to the Department she could not be enfranchised unless she was "entirely self-supporting". The correspondence also confirmed that, upon enfranchisement, Ms. Russ would not be entitled to "any monetary compensation". Mr. Deasy forwarded this information to Ms. Russ by letter dated April 27, 1922.

[14] Ms. Russ' application appears to have been resubmitted to the Department of Indian Affairs in June 1922. Included at that time was a letter from Ms. Russ' brother-in-law, C. M. MacIntyre, outlining the details of Ms. Russ' previous employment and confirming she was living and assisting in that household. On June 29, 1922, the Officer in Charge of the Lands and Timber Branch of the Department of Indian Affairs wrote to the Deputy Minister recommending the approval of Ms. Russ' application and confirming she would receive no monetary consideration. The Acting Superintendent General of Indian Affairs, in turn, wrote to the Governor-General-in-Council on July 5, 1922 seeking the required authorization of enfranchisement as contemplated by section 122A of the *Indian Act*.

[15] Under date of July 27, 1922 an Order-in-Council was issued declaring Ms. Russ enfranchised. This was communicated by Mr. Deasy to Ms. Russ by letter of August 22, 1922. On September 21, 1922, Ms. Russ wrote to Mr. Deasy to protest her enfranchisement. Her letter

stated she had not understood she would forfeit her inherited rights to the Haidah reserve at Skidigate. She also returned her Enfranchisement Card. It is clear from this letter she wanted her Indian status restored.

[16] On September 21, 1922, Mr. Deasy forwarded Ms. Russ' letter to the Assistant Deputy and Secretary of the Department of Indian Affairs for consideration. His reply to Ms. Russ on October 7, 1922 stated:

> Your letter of the 21st ultimo, addressed to Mr. Thomas Deasy, Indian Agent at Massett, B.C., objecting to your enfranchisement, has been forwarded to this Department for reply.
>
> It is impossible for the Department to meet your wishes in this matter, for the reason that you are no longer considered an Indian. It is difficult to appreciate your statement that you did not understand the conditions of your enfranchisement, in view of the fact that you signed the document of release and surrender wherein it was stated that you, as applicant, for enfranchisement, "do hereby surrender all claims whatsoever to any interest in the lands or property of the said Band, and do hereby remise, release and forever discharge the said band and His Majesty, as represented by the Superintendent General of Indian Affairs, and his successors of and from all and all manner of action and actions, cause of causes of actions, suits, debts, dues, sums of money, claims and demands whatsoever which I ever had or now have or can, shall or may have by reason of any matter, cause or thing whatsoever in respect to the said band."
>
> In the circumstances it is impossible for the Department to take any further action in this matter. The enfranchisement card which accompanied your letter is returned herewith.

[17] The record does not disclose that anything further came of Ms. Russ' objection or that she took any additional steps to remedy the situation.

[18] It is argued on behalf of the Applicants that Ms. Russ did not qualify for enfranchisement and it was deceitful for the Department to recommend that step to the Governor-in-Council. They say, on the face of what was provided to the Department and ultimately to the Governor-in-Council, it was clear that Ms. Russ was not self-supporting. They also point out that the Department's initial concern about having a close relative certify Ms. Russ' fitness for enfranchisement was not overcome in her subsequent application. For these reasons, the Applicants contend the Order-in-Council was irregularly issued and, therefore, unlawful.

[19] The requirements for a lawful enfranchisement under section 122A of the *Indian Act* in 1922 were the following:

a. the applicant was an unmarried Indian woman of at least 21 years of age;

b. the applicant held no reserve lands, did not reside on a reserve and did not follow an Indian mode of life;

c. the applicant sought to be enfranchised;

d. the applicant surrendered all claims in the lands or property of the Indian band; and

e. the Superintendent General was satisfied that the applicant is self-supporting and fit to be enfranchised.

[20] The only issues raised by the Applicants concern Ms. Russ' fitness and, more particularly, whether she was at the time of her application self-supporting. This had been an issue of concern as evidenced by the return of her initial application by the Department.

[21] It is of considerable significance that the historical record before the Court does not suggest that Ms. Russ was ever concerned or confused about the issues now relied upon by her grandsons. Indeed, she declared at the time that she was self-supporting – a fact also certified by her brother-in-law. Although it is clear she was not employed, it was also clear she was well-educated and living and assisting in the MacIntyre household. It was not unreasonable for the Superintendent General to find, on this evidence, that Ms. Russ was self-supporting to the extent necessary to support her application. Outside paid employment was not, after all, a requirement for enfranchisement. It is also significant that the decision challenged on this application is that of the Governor-in-Council and not the decision made by the Superintendent General on his review of the available evidence. It is the reasonableness of the Governor-in-Council's decision the Court must assess. On the face of the record before the Governor-in-Council, the decision to grant Ms. Russ' application was unquestionably reasonable.

[22] The Applicants also draw attention to the Department's initial concern about Mr. MacIntyre having certified Ms. Russ' fitness. The second application was similarly supported by his attestation of her fitness and the Applicants describe this as an irregularity. On this point, I accept the argument set out at paragraph 99 of the Respondent's Memorandum of Fact and Law:

> 99. The Applicant suggests that the fact that a document entitled "Certificate as to Fitness for Enfranchisement" was completed by her brother-in-law could render the decision unreasonable. This is not the case. The legislative requirement provides that the Superintendant be satisfied that Ms. Russ is fit to be enfranchised. There is no legislative requirement for a "certificate" let alone any legislative requirement for the form of such a document. Even if there were, the document indicates that is must be given to a "Clergyman, Justice of the Peace or other well known and responsible person." Her brother-in-law, who lists

> himself as an Engineer, could reasonably fall under the third category of "other well known and responsible person". But even if there was evidence to indicate the contrary, which there is not, it still does not render the decision unreasonable as there was no specific requirements with respect to how the Superintendent General is to be satisfied that an individual is "fit to be enfranchised" under s. 122A. [Footnotes omitted]

[23] As much as I sympathize with the unfortunate circumstances facing the Applicants, I am unable to find that the impugned Order-in-Council was unlawfully issued. Ms. Russ clearly had second-thoughts about what she had done; but her application for enfranchisement was regular on its face and she apparently took no steps after its issuance to legally challenge the decision. There is simply no evidentiary basis to reverse this decision after more than 90 years. If there is to be a remedy for what has befallen the Applicants, it lies not in a judicial forum but, rather, in the legislative.

[24] For the foregoing reasons, this application for judicial review is dismissed but, in the circumstances, without costs.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed without costs.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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